82-1952

No._____

Office-Supreme Court, U.S.
FILED
JUN 2 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LEO E. BALK,

PETITIONER,

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

(now - UNITED STATES INFORMATION AGENCY)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

Leo E. Balk, Petitioner,
2519 Holman Ave.
Silver Spring, Md. 20910
(301)-587-0091

QUESTIONS PRESENTED:

I. Whether the term "system of records" defined in the Privacy Act of I974 - 5 USC,Sec.552a (a)(5) - should be interpreted in civil litigation under the Act as relating only to computer-based systems of records?

2. Whether there are in the Privacy Act of I974 - 5 USC, Sec.552a - any provisions in addition to subsection (b) which require a nexus between a record and its incorporation into a system of records to sustain in court Plaintiff's allegations that a Federal Agency has violated these provisions?

3. Whether a federal court can summarily dismiss on the ground of "Plaintiff's record not being incorporated into a system of records" Plaintiff's allegations that the Agency has violated federal rules promulgated under the authority of the Privacy Act which specifically regulate personal information not placed in any system of records or, by their meaning, irrelevant of such placement?

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LEO E. BALK,

PETITIONER,

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY*

(now - UNITED STATES INFORMATION AGENCY)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

Leo E. Balk, a U.S. citizen and an employee of the U.S.Information Agency (former - U.S.International Communication Agency) respectfully petitions for a writ of certiorari to review and to summarily re-

*John W.Shirley, former Acting Director, USICA, was originally also a party to this case.

verse the judgment of the U.S.Court of Appeals for the District of Columbia Circuit in this case entered without opinion.

OPINIONS BELOW

Both the Court of Appeals and the District Court rendered judgments in this case without opinion. Memorandum of the Court of Appeals presented in App.A, infra, p.I , Order and Memorandum of the District Court in App.A, infra, p.6,I7 and the judgment of the Court of Appeals sought to be reviewed by Petitioner - in App.A, infra, p.I9 .

JURISDICTION

The judgment of the Court of Appeals was entered on March 9,I983. The jurisdiction of this Court is invoked under 28 USC, Sec.I254 (I).

STATUTORY PROVISIONS AND FEDERAL REGULATIONS INVOLVED

- The Privacy Act of I974 (P.L.93-579) - 5 USC, Sec.552a;

- 22 CFR, Foreign Relations, Chapter V - International Communication Agency, Part 505 - Privacy Act Policies and Procedures, I980;

- Privacy Act Issuances, I980 compiliation, International Communication Agency, Systems of Records, App.B, infra, pp.I-8.

- 5 CFR, Administrative Personnel, Part 293, Personnel Records,I980.

STATEMENT

This case originated upon a complaint by Petitioner Leo E.Balk filed on April I5, I98I in the U.S.District Court for the District of Columbia for damages resulting from numerous violations by the Defendant-Agency of the provisions of the Privacy Act of I974 (5 USC, Sec.552a) and the federal rules promulgated under its authority concerning collection,maintenance,and disclosure of personal information.

On June 27,I980 Petitioner requested the Agency under the Privacy Act to amend his record maintained by it by deleting from the record a libelous derogatory statement about him. On July I7 the Agency rejected the request and ruled that the statement was "justified". The next day Petitioner informed the Agency of his intention to appeal the ruling. On August I,

1980, before the Petitioner was able to file his appeal, the Agency arbitrarily destroyed the record to supress the appellate procedure. Petitioner then filed a complaint with the Agency Director and requested a letter of apology from the Voice of America. After the Agency had neither answered his complaint nor given him any relief, Petitioner filed his complaint in court.

The District Court immediately granted the Government's motion for a blanket protective order to stay discovery and later summarily dismissed Petitioner's complaint with prejudice and "on the ground that the contested memorandum is not within a system of records as required by the Privacy Act". App.A, infra, p.8,16.

The Court of Appeals affirmed,having stated in its memorandum that the record at issue "concerned the activities of another Agency employee and referred to Plaintiff tangentially. His name cannot be linked with the incident through a computer-based system . Hence, the memorandum was not contained in a "system of records" within the meaning of the Privacy Act." App.A, infra, p.4.

REASONS FOR GRANTING THE WRIT

The Privacy Act of 1974 - 5 USC, Sec.552a - is a federal statute which for almost a decade has been applied by lower courts without the benefit of a Supreme Court's guiding opinion. A number of important issues of access to and maintenance of personal information by the Federal Government and of its liability for violations of the Act, raised by typical similar cases, have therefore led to conflicting decisions not only in different circuits but, as in this case, by different panels in the same circuit. For example, there is no agreement between the circuits even on the nature of damages sustained by an individual as a result of the refusal or failure of a Federal Agency to comply with the statute: in the opinion of the Tenth Circuit, "it is invasion of the right [to privacy] that is the essence of the action... Thus, mental distress or embarrassment would be a natural and probable consequence of such an invasion." Parks v. IRS, 618 F2d 677 (1980), at 683. The Eleventh Circuit held, however, that "actual damages as used in

in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." Fitzpatrick v. IRS, 665 F2d 327 (I982), at 33I.

This case in particular illustrates legal frustrations of a private citizen who decided to seek relief from the federal courts and based his complaint upon the clear legislative history and the plain meaning of the Privacy Act. In the end Petitioner has been forced to believe that the Court of Appeals chose not to write its opinion and,therefore,not to rebut the arguments in the Appellant's brief,because of the apparent difficulty to satisfy in this case both the Federal statute and the judges' desire to find for the Government.

Petitioner alleged, and the record on appeal contains undisputable evidence that the Agency had violated 5 USC,Sec.552a(b)- by unlawful disclosure of his personal record to a third party; 5 USC, Sec.552a(d)(3)(4)- by dispensing with due process prescribed for the Agency therein, and 5 USC,Sec.552a(e)(I)(2)(5)(6)(9)(IO)-

by ignoring these provisions of the Privacy Act in regard to collection, use, and maintenance of personal information. On the basis of 5 USC, Sec.552a(g)(I)(C)(D) Petitioner also alleged violations of the following federal rules promulgated under the authority of the Privacy Act: 22 CFR, Sec. 505.I0 and 5 CFR, Sec.293.I03(a), 293.I04, 293.I06, 293.I08.

The Court below affirmed the dismissal on the ground of "the record not being in a system of records" even though Petitioner had shown:

- that the record at issue had to be incorporated by the Agency into one of its systems of records as it published the system in the Federal Register for I980 under the name "USICA-53", App.B, infra, pp.I-8.

- that after the Petitioner's request under the Privacy Act the record at issue was retrieved by Petitioner's name and released to him by the Agency;

- that for all purposes the record was treated by the Agency as any record in its system of records up to the time when Petitioner filed his complaint in court.

Petitioner had demonstrated further that in this case the requirement of incorporation is in itself irrelevant even to the issue of Agency's liability for unlawful disclosure, because federal rule 22 CFR, Sec.505.I0 prohibits the Agency to disclose "ANY information about an individual to ANY person or another Agency without the prior consent of the individual about whom the information is maintained."

Moreover, Petitioner's allegations under subsection (e) require no showing of a nexus between a record and its incorporation into a system of records. In Albright v. U.S., 63I F2d 9I5 (I980), the same Court of Appeals* held that the "plain meaning" of the "clear and unambiguous languauge" of subsection (e)(7) of the Privacy Act requires no such nexus, Albright, supra, at 9I8. The "plain meaning"of subsection (e)(9), for example, should therefore have been accepted by the Court as even more "clear and unambiguous": the subsection requires of the Agency "to establish rules of conduct for persons involved in the... ...

*Judge Mikva sat in consideration both of Albright and of this case.

maintenance of any system of records, OR in maintaining ANY RECORD, and instruct each person..."

And finally, both to the District Court and to the Court of Appeals Petitioner cited federal rules, which, having been promulgated under the authority of the Privacy Act, clearly prohibit claimed violations in regard to collection, use, and maintenance of personal information BOTH WITHIN and WITHOUT any system of records.

The courts below thus denied Petitioner any trial-like hearing on any of his allegations stated under the Privacy Act; both courts denied him any discovery to prove his allegations, intent and willfulness of the Agency violations, and an adverse effect the violations had on him. Therefore, for all practical purposes Petitioner has been denied standing to sue under the Privacy Act.

In a similar case Parks v. IRS, supra, p. 5 , the Court of Appeals for the Tenth Circuit, after a detailed analysis of the legislative history of the Privacy Act, held that government employees, who sufficiently claimed the Agency violations under

the federal statute, are entitled to have their case tried. Parks, supra, at 681,682, 683. The Court's decision was based, inter alia, on the U.S.Senate bill S.3418, which stated that "the grant of a cause of action to any "aggrieved person" is designed to encourage the widest possible citizen enforcement through the judicial process... ...The Committee intends the use of the term "aggrieved person" to afford the widest possible standing..." Parks, supra, footnote 2 on 682.

In the opinion of Petitioner, it is therefore clear that there is no basis either in law or in the legislative history for the judgment below: a requirement of a "computer-based connection" between Appellant's name and the incident [record] has been frivolously imposed by the Court to justify a frivolous dismissal, since under 5 USC, Sec.552a(a)(5) "the term "sistem of records" means a group of ANY records under the control of any agency...", and the Agency system of records "USICA-53", App.B, infra, p.5 ,refers to correspondence between the Agency and an individual, who filed with it a request under the Pri-

vacy Act, and to "any official and unofficial documents that are relevant to the request." See App.B, infra, p.5 , "USICA-53", Categories of records in the system. All records in this system are "paper records", and they are stored not in a computer but in "file folders" and retrieved not by a number or symbol but only "by name of individual requesting the information." See App.B, infra, p.6 , "USICA-53", Storage; Retrievability.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari and the request for summary reversal of the judgment below should be granted.

Respectfully submitted,

Leo E. Balk,

Petitioner,

June, 1983.

APPENDIX A

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No. 82-1561 - Leo E. Balk v. Hon. John W. Shirley, Acting Director, U.S. International Communication Agency

MEMORANDUM

This appeal challenges a district court order granting summary judgment in favor of the defendant and holding that a memorandum involving an intra-office dispute was not within a "system of records" as defined in the Privacy Act, 5 U.S.C. § 552a. We affirm.

Although he was apparently trained as a lawyer (appellee's appendix at 7), plaintiff works as a translator for the Voice of America, part of defendant International Communication Agency. In early 1979 another Voice of America employee, Zora Safir, circulated a memorandum critical of her supervisors. Several other employees, upset by the memorandum, demanded that she be fired. The chief of the department, Sherwood Demitz,

required all complaints to be written and addressed to Kirill Allen, the immediate supervisor.

One of the complaints, written by Alexander Firsow, made a casual, disparaging reference to plaintiff, who, in June of 1980, requested that this "Firsow" memorandum be destroyed. In July the Agency refused to do so. Plaintiff then demanded to see the Firsow memorandum, which Allen had retained. In August the Agency allowed plaintiff to see the memorandum after text relating to another individual had been deleted. The next month plaintiff demanded to see the "original" revision of the Firsow memorandum. This time the Agency deleted only the name of another employee mentioned therein.

Plaintiff filed suit under the Privacy Act and claimed damages for the Agency's unauthorized release of the

Firsow memorandum and its failure to maintain accurate and complete records. The Agency moved for summary judgment, which the district court granted on the ground that the Firsow memorandum was not within a "system of records" as defined in the Privacy Act.

The Privacy Act prohibits disclosure of protected agency records that the Agency keeps in a "system of records," which the Act defines as

> ". . . a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual; . . . ."

5 U.S.C. § 552a(a)(5). By affidavit Demitz explained that the Firsow memorandum was not placed in plaintiff's file. As chief of that division, his approval would have been necessary before any material could have been placed in plaintiff's file.

Although Demitz did put the memorandum in his office safe, he did not insert the memorandum into any organized group of records or information retrieval system or assign thereto any name, number, or symbol identifying plaintiff's connection therewith. In sum, the Firsow memorandum concerned the activities of another Agency employee and referred to plaintiff tangentially. His name cannot be linked with the incident through a computer-based system. Hence, the memorandum was not contained in a "system of records" within the meaning of the Privacy Act.

We have considered all claims advanced by the plaintiff and find them to be without merit. The order of the district court granting defendant's motion for summary judgment will be affirmed.[1]

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1. Contrary to plaintiff's assertion, the district court did not abuse its discretion by staying discovery pending disposition of the motion for summary judgment. The discovery rules vest broad disrection in the district court to regulate the discovery process. In this case, the district court held discovery in abeyance to avoid unnecessary expense and inconvenience to deponents, whose testimony would become irrelevant if the district court held, as it ultimately did, that the Firsow memorandum was not within a "system of records" as a matter of law.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEO E. BALK	)	[FILED MAY - 7 1982 James F. Davey, Clerk]
Plaintiff	)	
v.	)	
UNITED STATES INTERNATIONAL COMMUNICATION AGENCY	)	Civil Action No. 81-0896

MEMORANDUM OPINION

This matter is before the Court on defendant's motion for summary jusgment pursuant to Federal Rule of Civil Procedure 56. Plaintiff, a pro se litigant, is an International Radio Broadcaster with the U.S.S.R. Division of the Voice of America (VOA). On June 25, 1979, Sherwood H. Demitz, the Chief of the U.S.S.R. Division of the VOA, requested that Mr. Alexander Firsov write a memorandum concering the work behavior of another employee, Ms. Zora Safir. Although the memorandum focused

on Ms. Safir's conduct, the last portion touched on certain conduct by plaintiff. When defendant refused to amend or delete the portion of the memorandum relating to plaintiff or destroy the entire document, plaintiff instituted this action under the Privacy Act of 1974 for actual damages and equitable relief. See Pub. L. No. 93-579, 88 Stat. 1897 (1974) (codified at 5 U.S.C. § 552a (1976)).

While summary judgment should be employed to avoid useless trials where there are no genuine issues of material fact in dispute, this Court recognizes that "summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use." Brunswick Corp v. Vineburg, 370 F.2d 605, 612 (5th Cir. 1967). In ruling on a motion for summary judgment, a court should confine its inquiry to determining whether a genuine

triable issue of fact exists, and should not not attempt to resolve prematurely bonafide factual disputes under the guise of a Rule 56 disposition. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). It is clear that the moving party bears the burden of demonstrating that there are no genuine issues of material fact and that the movant is accordingly entitled to judgment as a matter of law. See Bloomgarden v. Coyer, 479 F.2d 201, 206-07 (D. C. Cir. 1973); Nyhus v. Travel Management Corp., 466 F.2d 440, 442 (D. C. Cir. 1972). Despite these cautionary principles, this Court will grant defendant's motion for summary judgment on the ground that the contested memorandum is not within a "system of records" as required by the Privacy Act. See 5 U.S.C. §§ 552a (5) & (b) (1976).

Section 552a(b) of the Privacy Act provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . ." (emphasis added). The Privace Act defines a "system of records" restrictively as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5) (1976). See Smiertka v. IRS, 447 F.Supp. 221, 228 (D.D.C. 1978), remanded on other grounds, 604 F.2d 698 (D. C. Cir. 1979).

> Congress' chief concern was misuse of the enormous amounts of personal information about individuals collected by government agencies. In particular the legislative history reveals a fear that increased use of computers to store large amounts of data enhanced the danger that sensitive information concerning an individual could be collected by an agency for one purpose and used by another agency without that individual's knowledge or consent.

Houston v. DOT, 494 F.Supp. 24, 27 (D.D.C. 1979). Hence, it is clear that the limitation to "systems of records" ensures that all records possessed by the Government will not be governed by the Privacy Act.

In the instant case, defendants have submitted an uncontested affidavit which indicates that the Firsow memorandum was submitted to plaintiff's immediate supervisor, Mr. Allen, and a photocopy of the memornadum was obtained by Mr. Demitz who kept it in his office safe which was not

part of the regular system of files. See Affidavit of Sherwood Demitz, Chief of the U.S.S.R. Division of VOA, at 3. In addition, Mr. Demitz has stated that no copies of the Firsow memorandum were "entered into the formal Agency or VOA file system, including the Personnel Office's files...[and] no copy of this memorandum has been placed in any file relating to Leo Balk."* Id. Thus, at the time of its distribution through the present date, the Firsow memorandum has not been in any

---

* Mr. Demitz's statement gains added credence given the fact that the Firsow memorandum primarily concerned the conduct of Ms. Safir. Consequently, if the memorandum were placed in any VOA files, it likely would have been Ms. Safir's file. That possibility, however, is directly refuted by Mr. Demitz's account that Mr. Firsow withdrew all copies of his memorandum from circulation. See Affidavit of Sherwood Demitz, at 2.

organized group of records or in any other information retrieval system as contemplated by the Privacy Act.

The fact that the Firsow memorandum could be retrieved by Mr. Demitz, and perhaps other VOA personnel, on the basis of their memory of its location is irrelevant.

> Only if information about individuals is maintained in groups of records keyed to the requestor are agencies required to afford access. This means that even if information pertaining to the requestor appears in a system of records, it need not be disclosed unless the information is retrievable by means of the requestor's own name or other personal identifier. That it can be easily retrieved in some other way by some other identifier is wholly beside the point.

Smiertka v. IRA, 447 F.Supp. at 226. If the abilities of agency personnel to retrieve a record based on their memories were sufficient to trigger the application of the Privacy Act, "then almost any record

in the custody of an agency would be covered regardless of the practical reality that there would be scant likelihood of the computer-based information abuse that the Act was designed to protect against." Carin v. United States, C.A. 76-2222. (D.D.C. August 5, 1980).

The few arguments plaintiff advances in opposition to defendant's motion for summary judgment are groundless. Plaintiff initially appears to suggest a theory of estoppel. Because defendant's response to plaintiff's initial request to remedy the Firsow memorandum suggested the document was in the VOA file, see Exhibit A of the Complaint, at 8, plaintiff contends defendant cannot now claim the memorandum was not part of a "system of records." The portion of defendant's response to which plaintiff refers, however, is merely a recitation of plaintiff's allegations and in no way admits that the memorandum was

held in a "system of records." Even if defendant's letter can be construed to suggest that the memorandum was in a "system of records," it cannot constitute an estoppel at such a preliminary phase of the administrative process. Simply processing and denying a Privacy Act request should not trigger the forfeiture of any statutory defenses. Otherwise, processing these requests would come to a standstill with the Government operating with great caution to preserve statutory defenses in their responses to a great number of administrative inquiries.

Plaintiff also argues that the Privacy Act's relatively broad definition of records, see 5 U.S.C. § 552(a)(4)(1976); King v. Califano, 471 F.Supp. 180 (D.D.C. 1979), prevents the granting of summary judgment. Yet, plaintiff has confused the terms "records" and "systems of records."

Assuming that the Firsow memorandum is a "record," it must still be within a system of records to activate the Privacy Act; and defendant has clearly demonstrated otherwise.

Finally, plaintiff has asserted that defendant violated other rules and regulations with respect to personnel material not in a system of records. This assertion, however, admits that the personnel materials in question are not covered by the Privacy Act. Given that the only agency regulations plaintiff has cited throughout this litigation concern the responsibilities of government agencies under the Privacy Act, see 5 C.F.R. § 297.301 et seq. (1982), plaintiff's assertions are totally devoid of support on this record. Moreover, plaintiff has not satisfied the prerequisites for stating a claim based on agency rules or regulations. Section 552a(g)(2)(D) requires

not only that a government agency fail to comply with a rule, but that it must be "in such a way as to have an adverse effect on an individual." Plaintiff's conclusory allegations of defendant's failure to comply with Privacy Act regulations, without any allegation of an adverse effect, do not state a cause of action udner the Privacy Act.

Accordingly, the Court will grant defendant's motion for summary judgment since the challenged memorandum was not held in a "system of records."

/s/
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

AN ORDER WAS ISSUED ON APRIL 30, 1982.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEO E. BALK,	:	[F I L E D APR 30 1962
Plaintiff,	:	James F. Davey, Clerk]
v.	:	
UNITED STATES INTERNATIONAL COMMUNICATION AGENCY	:	Civil Action No. 81-0896
Defendant.	:	

O R D E R

Upon consideration of defendant's motion for summary judgment, plaintiff's opposition, the accompanying memoranda of law and the entire record herein, and it appearing that there are no genuine issues of material fact, it is this [30th] day of April, 1982,

ORDERED that defendant's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED that the above-captioned action be, and hereby is, dismissed with prejudice.

Opinion to Follow.

/s/
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT
JUDGE

NOT TO BE PUBLISHED - SEE
LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 82-1561 September Term, 1982

Leo F. Balk, Civil Action No.81-00896

Appellant [UNITED STATES COURT OF APPEALS for the District of Columbia Circuit]

v.

Hon. John W. Shirley, Acting Director, U.S. International Communications Agency [FILED MAR 9 1983 GEORGE A. FISHER Clerk]

Appeal from the United States District Court for the District of Columbia

Before: Robinson, Chief Judge, Mikva, Circuit Judge, and Van Dusen,* Senior Circuit Judge, United States Court of Appeals for the Third Circuit

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia,

and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the accompanying memorandum.

It is FURTHER ORDERED, by this Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until sevel days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

/s/
George A. Fisher, Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX B

THE INTERNATIONAL COMMUNICATION AGENCY SYSTEM OF RECORDS

"USICA-53"

1980

System name: Privacy Act - Freedom of Information Act file - CPL - USICA

8 pp.

PRIVACY ACT ISSUANCES

I980 COMPILIATION

Seal of the National Archives of the United States

VOLUME V

- Systems of Records
- Agency Rules

EXPLANATION

This compiliation contains:

- descriptions of systems of records maintained on individuals by Federal agencies which were published in the FEDERAL REGISTER as required by the Privacy Act of I974;

- rules of each agency which set out the procedures that agencies will follow in helping individuals who request information about their records.

This compiliation is divided into six volumes. A table on page vii lists the agencies in Volumes I-V of the Compili-

ation. Volume VI contains Research Aids.

AUTHORITY

This is the fifth annual compiliation of Privacy Act issuances. It is published in compliance with the requirements of the Privacy Act of I974 (5 USC,Sec.552a). The Act requires the Office of the Federal Register (OFR) to annually compile and publish the rules and notices of systems of records that have been issued by Federal agencies subject to the Act. The Act also requires each Federal agency to annually publish in the FEDERAL REGISTER the notice of its systems of records.

CUTOFF DATES

NOTICES OF SYSTEMS OF RECORDS have been compiled as of December 3I, I980 unless otherwise noted.

PRIVACY ACT ISSUANCES,

I980 COMPILIATION
VOLUME V

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USICA-53

SYSTEM NAME: Privacy Act-Freedom of Information Act file - CPL-USICA

SYSTEM LOCATION: Congressional and Public Liaison, International Communication Agency, I750 Pennsylvania Ave., N.W., Washington, D.C.20547.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: Individuals who have requested documents, records or other information concerning themselves from the Agency pursuant to the Freedom of Information Act (5 USC, 552), or the Privacy Act of I974 (5 USC, 552a).

CATEGORIES OF RECORDS IN THE SYSTEM: Personal information that may be contained in reports, memoranda, letters, or any other official or unofficial documents that are relevant to the request.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM: 5 USC, 552 and 5 USC, 552a.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

For processing of requests recieved pursu-

ant to the Freedom of Information and Privacy Acts.

Also see Prefatory Statement on General Routine Uses.

Information is made available on a need-to-know basis to personnel of the International Communication Agency as may be required in the performance of their official duties. Information in these records is not normally available to individuals or agencies outside the International Communication Agency, but records may be released to other government agencies who have statutory or other lawful authority to maintain such information.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

Storage: Paper records in file folders.

Retrievability: By name of individual requesting the information.

Safeguards: Records are under surveillance by authorized employees during working hours, and are stored in combination-lock cabinets when not in use.

Retention and disposal: Retired and destroyed in accordance with schedules of the International Communication Agency.

SYSTEM MANAGERS AND ADDRESS: Access to Information Officer, Congressional and Public Liaison, International Communication Agency, Washington, D.C. 20547.

NOTIFICATION PROCEDURE: Director (USICA), Congressional and Public Liaison, I750 Pennsylvania Ave., N.W., Washington,D.C.20547.

RECORD ACCESS PROCEDURES: Requests from individuals should be addressed to: Assistant Director (USICA), Congressional and Public Liaison, I750 Pennsylvania Ave., N.W., Washington, D.C. 20547.

CONTESTING RECORD PROCEDURES: The Agency's rules for access and for contesting contents and appealing initial determinations by the individual concerned appear at 22 CFR, Chapter V, Part 505 and were published in the Federal Register on October 2I, I975 (40 FR 49278) and on September 22, I976 (4I FR II424) and on April 4, I978 (43 FR I4298).

RECORD SOURCE CATEGORIES: Compiled as a result of requests under the Freedom of Information Act and the Privacy Act.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT: Certain records contained within this system of records may be exempted

from 5 USC, 552a(c)(3), (d), (e)(I),(e)(4)(G),(H),and (I),and (f). See amendments to 22 CFR, Chapter V, Part 505.I5 as published in the proposed rule section of the Federal Register for December I0,I976.

Office-Supreme Court, U.S.
FILED
AUG 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1952

In the Supreme Court of the United States

OCTOBER TERM, 1983

LEO E. BALK, PETITIONER

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1952

LEO E. BALK, PETITIONER

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a translator in the U.S.S.R. Division of the Voice of America (Pet. App. 1, 6), brought this action under the Privacy Act, 5 U.S.C. 552a, seeking damages and equitable relief based upon a reference to him in an intra-office memorandum written by a fellow employee. Both courts below rejected petitioner's claim on the ground that the challenged memorandum was not contained in a "system of records" within the meaning of the relevant provision of the Act, 5 U.S.C. 552a(a)(5).

1. In 1979, Zora Safir, a Voice of America employee, circulated a memorandum critical of her supervisors (Pet. App. 1). When several other employees urged that Safir be fired, the department chief, Sherwood H. Demitz, required that all such recommendations be made in writing (*id.* at 1-2).

One such complaint was written by Alexander Firsow (Pet. App. 2). Although Firsow's memorandum focused on Safir's conduct, the last portion of it made a casual disparaging reference to petitioner (*id.* at 2, 7). Petitioner requested that the Firsow memorandum be destroyed (*id.* at 2). The International Communication Agency initially refused to do so but gave petitioner a copy of the memorandum, with only the name of another employee deleted (*ibid.*). Later, the Agency deleted the reference to petitioner in the original of the memorandum (Pet. 4; Appellee's C.A. App. 25, 26).[1]

Petitioner then brought this action under the Privacy Act, seeking damages and equitable relief and claiming that the Agency had wrongfully refused to amend the memorandum, had released the memorandum to another individual without his consent, and had not complied with record keeping requirements of the Act.. The government submitted an affidavit of Demitz stating that no copies of the Firsow memorandum had been entered into the Agency's file system or placed in any file relating to petitioner, although a copy of the memorandum, apparently with the reference to petitioner intact, was kept in Demitz's office safe (Pet. App. 10-11).

On the basis of this uncontested showing, the district court held that the Firsow memorandum was not part of a "system of records" within the meaning of the Privacy Act (Pet. App. 6-16). Accordingly, it granted the government's motion for summary judgment. The court of appeals affirmed on that same ground in an unpublished memorandum (*id.* at 1-5).

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[1] "Appellee's C.A. App." refers to the Appellee's Appendix filed in the court of appeals.

2.a. The courts below correctly held that the provision of the Privacy Act concerning disclosure of records, 5 U.S.C. 552a(b), does not apply to the Firsow memorandum. That holding does not conflict with any decision of this Court or any other court of appeals, and further review is accordingly unwarranted. 5 U.S.C. 552a(b) provides (emphasis added) that "[n]o agency shall disclose *any record which is contained in a system of records* by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains unless disclosure of the record" comes within a specified exception. A "system of records" is defined in 5 U.S.C. 552a(a)(5) as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual."

In the present case, Demitz's uncontested affidavit shows that the Firsow memorandum never became part of any formal agency file and that no copy of it was placed in any file relating to petitioner (Pet. App. 10-11). It is immaterial that Demitz retained a copy in his office safe or that the Agency could retrieve the document in response to petitioner's request because Agency officials remembered where it was placed. The Privacy Act provides protection against disclosure only if the document is maintained in a group of records from which it may be retrieved based upon the name or identifying symbol of the individual. See *Boyd* v. *Secretary of the Navy*, No. 82-6006 (11th Cir. July 11, 1983), slip op. 3913; *Olberding* v. *Department of Defense*, No. 82-2192 (8th Cir. June 17, 1983); *Savarese* v. *HEW*, 479 F. Supp. 304, 307 (N.D. Ga. 1979), aff'd, 620 F.2d 298 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *Smiertka* v. *Department of Treasury*, 447 F. Supp. 221, 228-229 (D.D.C. 1978), remanded on other grounds, 604 F.2d 698 (D.C. Cir. 1979).

Petitioner points out (Pet. 7) that the Agency has a system of records for all its Privacy Act and Freedom of Information Act files, but there is no indication that the Firsow memorandum became part of whatever Privacy Act file the Agency created in response to petitioner's request. Indeed, Demitz's affidavit indicates that the Firsow memorandum was not in any such file.

b. Petitioner's claim that the Agency wrongfully refused to amend his record plainly does not warrant further review because the Agency has now deleted the reference to petitioner in the original of the Firsow memorandum.

c. Petitioner claims (Pet. 6, 8-9) that the Agency violated various provisions of 5 U.S.C. 552a(e), which imposes certain requirements upon agencies with respect to the collection, use, and maintenance of personal information. However, petitioner has failed to support his general claims with specific allegations or to explain how he was harmed by the alleged violations. For example, he has not specified how the reference to him in the Firsow memorandum was inaccurate, even though the OMB Privacy Act guidelines place the burden of challenging the accuracy of a record upon the individual.[2] 40 Fed. Reg. 28948, 28969 (1975).

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[2]Thus it is irrelevant whether, as petitioner maintains (Pet. 8), 5 U.S.C. 552a(e) applies to records not contained in a system of records. See *Albright* v. *United States*, 631 F.2d 915, 917-920 (D.C. Cir. 1980) (5 U.S.C. 552a(e)(7)), prohibiting the maintenance of records on the exercise of First Amendment rights, applies to records not in system of records). See also *Clarkson* v. *IRS*, 678 F.2d 1368, 1373-1378 (11th Cir. 1982) (*Albright* limited to 5 U.S.C. 552a(e)(7)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1983

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FILED
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ALEXANDER L. STEVAS,
CLERK

No.82-I952

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,I983

LEO E.BALK, PETITIONER,

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

On Petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION FOR THE RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-1952

LEO E. BALK, PETITIONER,

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

On Petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION FOR THE RESPONDENT

I. Respondent has not been able to refute arguments brought up in the Petition and based on the exact language of the Privacy Act, on the federal rules promulgated under its authority, and on its legislative history. The manifest weakness of the Respondent's legal position logically led to his cavalier treatment of facts in the pe-

titioned case. However, as the record will show:

Ia. Petitioner's official written request under the Privacy Act to release the record at issue was mailed to the Agency on June 27, I980. As long as the system of records "USICA--53" officially published by the Agency was in effect on that day (Pet.,App.B,pp.I-4), the legal presumption must be that the record and all other documents relevant to the request were incorporated into the system three days later when the Agency received the request through the U.S.mail. (See Pet., App.B,p.5 - Categories of individuals and categories of records in the system). Respondent was not able to rebut this presumption. Mr.Demitz, whose so-called "uncontested" affidavit (see infra) was executed more than one year later (on July 23,I98I), was an official in charge of a broadcasting unit and knew nothing about the Privacy Act or the systems of records maintained by the Agency. On July 3I,I98I Respondent also had Mr.Charles Jones,Jr. to execute an affidavit in this case. Mr.Jones was then and is now the Privacy-Freedom of Information Acts Co-

ordinator with the Agency. He was the official to know. But despite that the argument of "the record not being in a system of records" had by that time become the only Respondent's defense in the District Court, Mr. Jones' affidavit contains no statement in support of this argument. Mr.Jones could not make such statement under oath: there were no reasons for the Agency to treat Petitioner's request under Privacy Act any differently from other such requests and not to place it in the "USICA-53". And even if the Agency did make this unexplainable exception for Petitioner, in accordance with 5 USC, Sec.552a(e)(G) it should have immediately notified him that his request and all relevant documents were not placed into the system of records.

Ib. Affidavits of both Mr.Demitz and Mr. Jones were attached to the Respondent's motion to dismiss or for summary judgment which was filed with the District Gourt on about August I,I98I. With his response to that motion, on October I3,I98I, Petitioner filed with the Court his own affidavit executed on October 3,I98I by which he timely and explicitly contested affidavit testimony

of both officials, having stated that their testimony "gave a distorted picture of some of material facts at issue in this case..."

Ic. At the very outset of his correspondence with the Agency Petitioner notified its officials that the record at issue was a malicious libel against him. For a long time Petitioner repeatedly tried to discuss and to settle this matter within the Agency, but all his written and oral complaints and requests for relief were completely and contemptuously ignored by its officials. When the District Court received Respondent's motion for protective order, the judge issued the order to block all discovery by Petitioner without even waiting for his response to the motion as provided by the rules of the District Court. With all this information in the record Respondent tries to put on Petitioner the blame for failure "to support his general claims with specific allegations", etc. Moreover, this attempt runs contrary to the Privacy Act: intent and/or willfulness of the Agency, which are prerequisites of its liability for damages, must, under 5 USC, Sec. 552a(g)(4), be deter-

mined by the Court at the trial. These material issues of fact "cannot be disposed of summarily on the papers before the Court." See Zeller v. U.S., 467 FSupp.487 (I979), at 503.

The factual background in this case presented in Petition and in this Reply has been confirmed by documents in the record and supported by argument before the Court of Appeals. Its affirmance of dismissal despite of a number of clearly defined material issues of fact between the parties was therefore inappropriate under the law and strikingly unfair to Petitioner.

2. None of the cases cited in Respondent's memorandum raises issues present in the petitioned case: whether or not Plaintiff's record was in a system of records or whether Defendant violated specific federal rules promulgated under the authority of the Privacy Act. None of these cases answers questions presented to this Court. And while Boyd v.Secretary of the Navy, No.82-6006 (II-th Cir.,I983), is plainly irrelevant because Plaintiff had a full trial in the District Court, Savarese v. HEW, 479 FSupp.304 (I979), supports Petitioner's po-

sition that his claim under 5 USC,Sec.552a (e)(5) does represent a genuine issue of material fact for litigation and cannot be disposed of summarily. See Savarese, supra, [3], at 306-307.

Clarkson v. IRS, 678 F2d I368 (I982), only adds confusion and uncertainty over the meaning of different subsections of the Privacy Act. The Eleventh Circuit came to a conclusion that subsections (d)(2), (d)(3), and (e)(7) did not require a record to be in a system of records to make Plaintiff's allegations sustainable in court, whereas subsections (e)(I) and (e)(5) did. Clarkson, supra, [9,I0] at I376, [II] at I377. However, the plain meaning of the clear language in (d)(2) and (3), when compared with that of (e)(I) and (5), makes this differentiation extremely unpersuasive.

The legislative history of the Privacy Act leaves no doubt about clear intent of Congress to curtail endless abuses of the Government's power to collect, maintain, and use personal records of all sorts on individuals. See,for example, Parks v. IRS, 6I8 F2d 677, footnote I on 68I, also Pet.pp.9,I0. Subsection (e), in the clear language of

its paragraphs (I)(2)(3)(5)(6)(8)(9),has been designed to prevent certain abuses in regard to "all records" or "any record" or "information" about "an individual" or "each individual". These words of English need no legal interpretation. Neither Congress, in passing the Privacy Act, meant to sanction judicial restriction of the rights of persons protected by the statute with surgeries of summary dismissals of legally valid allegations, which, if being proved at the trial, may somehow embarrass government officials. The motto of "equal justice under law" must first be practiced in courts of all places.

Petitioner respectfully requests the Court to grant his Petition and to reverse the judgment of the Court of Appeals.

Leo E.Balk,
Petitioner

September 1983